ATTORNEY FOR APPELLANT

Paul J. Podlejski
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Terrance Leroy Smoots, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 27, 2021

Court of Appeals Case No. 20A-CR-2101

Appeal from the Madison Circuit Court

The Honorable Mark Dudley, Judge

Trial Court Cause No. 48C06-1910-F5-2512

Altice, Judge.

Case Summary

[1] Terrance Smoots appeals his convictions for battery resulting in serious bodily injury, a level 5 felony, criminal confinement resulting in moderate bodily

injury, a level 4 felony, obstruction of justice, a level 6 felony, attempted obstruction of justice, a level 6 felony, and the finding that he was a habitual offender. Smoots argues that he was denied his right to confrontation under the Sixth Amendment to the United States Constitution and claims that the trial court abused its discretion in sentencing him. Smoots also challenges the appropriateness of the twenty-four-year aggregate sentence that the trial court imposed.

[2] We affirm.

Facts and Procedural History

[3] On September 24, 2019, Robert Simmons, an inmate at the Indiana Department of Correction (DOC), was transported to the Madison County Jail pursuant to a DOC directive. At approximately 2:17 p.m., Simmons carried his bedding and some personal effects to his cell block. As Simmons unpacked his belongings, Smoots—also a prisoner at the jail—was watching from the upper level.

[4] At some point, the jail's video surveillance camera showed Smoots pull his hair back and remove his long-sleeved shirt. Moments later, Smoots and his cellmate and another inmate walked down to Simmons's cell block. Someone shut the door from the inside, thus locking the four men in the same cell. The door remained shut for the next several minutes.

[5] At 2:30 p.m., the jail's surveillance video showed two of the inmates dragging Simmons from the cell with his pants around his ankles. The two men then pushed and kicked Simmons down some concrete stairs as Smoots exited the cell. Following a report of the attack, several correctional officers went to the cell block and observed Simmons lying unconscious at the bottom of the stairs. Simmons's face was puffy and bruised, there was feces on his pants, and he was unable to respond to questioning. Simmons was handcuffed and underwent a medical check. After determining that Simmons had facial cuts, bruises, swelling, an involuntary bowel movement, and was "coming in and out of consciousness," jail personnel transported him to an Anderson Hospital. *Transcript Vol. IV* at 198.

[6] Simmons told medical personnel that he had been in a fight that involved "4 on 1" over a "street beef." *Id.* at 94. Simmons stated that he had been struck several times and felt pain "all over." *Id.* Simmons's left eye was swollen shut and he claimed that his involuntary bowel movement had resulted from being "choked out" by "Squirt"—which was Smoots's nickname. *Exhibit* 24 at 46. Simmons was released from the hospital later that evening and transported back to the jail.

[7] Smoots was "written up" because he was observed "acting suspiciously" in the cell block before and after the attack on Simmons. *Transcript Vol. V* at 134-35. When jail personnel provided Smoots with a copy of the report, he denied striking Simmons and repeatedly stated to the officers, "you didn't see me hit him." *Id.* at 136.

[8] Three days after the attack, an investigator questioned Simmons about the incident. At that time, Simmons's eyes were swollen, he was moving slowly, groaning, and complaining of pain. Simmons told the investigator that "he was jumped by three dudes because they thought he was a snitch." *Transcript Vol. IV* at 21. Although Simmons claimed that he was not a "snitch," he did not want to make a statement because that would "make things worse." *Id.*

[9] On September 28, 2019, Simmons participated in a recorded jail visit with his mother. Simmons told his mother that although he was able to see out of his eye, something was still "wrong" because he thought some of his ribs were broken. *Id.* at 95-96. During that conversation, Simmons identified Smoots as the attacker and described the incident as follows:

> It was like he was just like—he just just jealous. You feel me? I don't even know this ni**er like that. Know what I'm saying? His name is Squirt. He ain't nobody. He ain't even got no car out there. It . . . was three people. Three, yeah. Anyways, they waited until I went in the room and they all ran in there in the room and locked the door. That's why I look like this because they had their way with me. But I don't even know this ni**er though. You know what mean? I don't know nothing about him. He told the two some bullsh*it. But he caught me good, though.

Id. at 16.

[10] In October 2019, the State charged Smoots with battery resulting in serious bodily injury, criminal confinement, and with being a habitual offender. Simmons was initially cooperative with the prosecutor and engaged in several conversations with victim's assistance representatives in December 2019 and

January 2020. At some point, however, Simmons told one of the staff that he would not participate in Smoots's prosecution because he was "concerned for his general safety and [was in] fear for his life." *Id.* at 113.

[11] In December 2019 and February 2020, Simmons received three subpoenas regarding the case. Simmons reported that he had received telephone calls from Smoots's brother, "Red," and a woman named Tiffany, who threatened to kill him and his family if he testified against Smoots. A case manager assigned to Simmons reviewed the relevant jail phone records and confirmed that Simmons had, in fact, received calls from phone numbers associated with Red and from two phone numbers associated with a woman named Tiffany Arnold. Arnold had been housed in the cell block directly above Smoots's cell block and was released from jail on February 15, 2020.[1]

[12] Simmons failed to appear for a deposition in February 2020 and had no further contact with any representatives from the victim's assistance program. Simmons subsequently informed court and jail personnel that he skipped the deposition because he was concerned for the safety of his mother and children, as well as his own, because of the threats that had been made against him. A review of recorded jail calls and cellphone records showed that Smoots had

[1] Inmates are known to communicate with prisoners in other cells "through the vents and plumbing." *Transcript Vol. II* at 207-08.

conversations with Red, Arnold, and an another unidentified individual about Simmons's potential testimony against him.

[13] The evidence showed that Arnold located Simmons's telephone number on Facebook after she was released from jail. The two exchanged texts and phone calls and after the second call that lasted for about twenty minutes, Simmons sent Arnold a message explaining that he was being encouraged to testify by the prosecutor and his case manager but stated that "[he] was done talkin.'" *Exhibit* 54. The records also established that Red contacted Simmons on two occasions, that Arnold texted Red on February 21, 2020, and that Red had called Arnold that same day.

[14] Smoots acknowledged that he was speaking in "code" during the recorded jail calls and was talking about contacting Simmons. *Transcript Vol. V* at 241, 248. Smoots was prohibited from communicating with Simmons because a no contact order had been issued at his initial hearing. Smoots asked the unknown recipient of the jail calls if he remembered talking to "that little bitch, " finding out "what the motherfucker talking about . . . and get his temperature." *Exhibit* 35. In a later call, the unknown call recipient said he talked to "buddy ass" about receiving a subpoena and that Simmons indicated he would not testify and "he shouldn't do sh*t." *Id.* at 85.

[15] Smoots asked Arnold during one of the calls if she had told Simmons "what I said?" *Exhibit* 41. Arnold responded that Simmons found her threatening and that Simmons had received an offer that was "hard to refuse." *Id.* In another

call, Arnold again told Smoots that Simmons felt threatened, and assured Smoots that she was "doing [her] best." *Transcript Vol. V* at 76. Arnold told Smoots that another person identified as "Mary . . . "backed [her]" by also calling Simmons, which prompted Smoots to tell Arnold "you keep doin' too much on these phones." *Exhibit* 41. Arnold told Simmons in a different call that she had been in contact with Red and wanted advice on how to proceed. In response, Smoots instructed Arnold to "tell bro, have bro check it out." *Id., Ex.* 6. Smoots subsequently told Red in a recorded call to "take a motherfuc*er temperature" and instructed his brother to have someone in Simmons's work release program "check on him." *Id.* at 37.

[16] Thereafter, the State amended the charging information to include charges for obstruction of justice, attempted obstruction of justice, and invasion of privacy. The State then filed a motion requesting that it be allowed to present evidence pursuant to a "right of confrontation exception" that would allow evidence of Simmons's conversations with law enforcement and others without Simmons's presence at trial. *Appendix Vol. II* at 113. The motion alleged that the evidence should be admitted because Smoots and others "improperly influenced, threatened or coerced . . . Simmons into absenting himself from testifying." *Id.*

[17] Following a hearing, the trial court granted the State's request to present such evidence and determined that "Smoots['s] acts procured the absence of Simmons . . ." and, therefore "Smoots forfeits his right to confront Simmons and to object to hearsay statements." *Id.* at 158. The trial court specifically found that Smoots had called Red and Arnold, who then contacted Simmons

and "communicated threats of harm if Simmons chose to testify against" Smoots. *Id.* at 155.

[18] The State dismissed the invasion of privacy charge, and the matter proceeded to trial on September 14, 2020. When the State offered the exhibits involving Simmons's conversations and statements, Smoots made the following continuing objection regarding the admissibility of that evidence: "I'll submit an objection . . . as to hearsay confrontation [sic] complete defense as to any statements made by Robert Simmons." *Transcript Vol. IV* at 18. The trial court overruled the objection, and Simmons's statements were admitted. At the conclusion of the four-day jury trial, Smoots was found guilty on all remaining charges and was determined to be a habitual offender.

[19] At the sentencing hearing on October 16, 2020, the trial court identified the following aggravating factors: (a) Smoots's criminal history; (b) the harm was greater than what was needed to prove the offenses; and (c) Smoots committed the crimes in a jail setting. The trial court noted that Smoots's proffered mitigating circumstances—the attainment of a GED, the hardship that his children would suffer as a result of his incarceration, and his upbringing—were not significant as to warrant a lesser sentence.

[20] The trial court sentenced Smoots to a concurrent term of four years for battery resulting in serious bodily injury, nine years for criminal confinement, twenty-three months for obstruction of justice, twenty-three months for attempted obstruction of justice, and to a fifteen-year enhancement of the criminal

confinement conviction in light of the habitual offender finding, thus resulting in an aggregate twenty-four-year term of incarceration.

[21] Smoots now appeals.

Discussion and Decision

I. Hearsay and the Right to Confront Witnesses

[22] Smoots argues that the trial court abused its discretion in admitting Simmons's out-of-court statements into evidence. Smoots contends that Simmons's statements were inadmissible hearsay, and that admission of the evidence violated his right to confront and cross-examine Simmons as guaranteed by the Sixth Amendment to the United States Constitution.

[23] As Smoots is claiming that Simmons's out-of-court statements violated his federally guaranteed right to confront and cross-examine Simmons, our standard of review is de novo. *See Tiplick v. State*, 43 N.E.3d 1259, 1262 (Ind. 2015) (an evidentiary claim that raises a constitutional claim is reviewed de novo). The Confrontation Clause of the Sixth Amendment to the United States Constitution provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This right allows the admission of an absent witness's out of court statement only if the witness is unavailable, and the defendant has had a chance to cross examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). An exception to the right, however, exists when the defendant's "own

wrongdoing caused the declarant to be unavailable to testify at trial." *Scott v. State,* 139 N.E.3d 1148, 1153 (Ind. Ct. App. 2020), *trans. denied*. This exception, termed the "forfeiture by wrongdoing doctrine," is designed to protect the integrity of the judicial process, and when a defendant attempts to undermine that process by procuring or coercing silence from witnesses, the Sixth Amendment right to confrontation may be forfeited. *Davis v. Washington,* 547 U.S. 813, 833 (2006).

[24] For a defendant to have forfeited his confrontation rights by wrongdoing, "the defendant must have had in mind the particular purpose of making the witness unavailable." *Scott,* 139 N.E.3d at 1154 (citing *Giles v. California,* 554 U.S. 353, 367 (2008)). The State bears the burden of showing by a preponderance of the evidence that the defendant forfeited his right to confrontation under this theory. *Davis,* 547 U.S. at 833. We consider evidence from the forfeiture hearing and the trial to independently assess whether the State met its burden. *See Scott,* 139 N.E.3d at 1154.

[25] Here, the evidence established that immediately after the attack, Simmons initially cooperated with law enforcement officers and provided information and details about the incident. Simmons, however, subsequently explained that he disregarded a subpoena to testify at a deposition because of the death threats that were lodged against him by Arnold and Red through the telephone calls. Simmons told his case manager that he had received calls from Red and Arnold who threatened his life if he testified against Smoots. Simmons also stated that they made threats against his mother and the life of the mother of his child.

[26] The case manager investigated those claims and confirmed that Simmons had received calls from phone numbers associated with Red and two phone numbers associated with Arnold. Moreover, the evidence established that Smoots ordered Red and Arnold to make those threats against Simmons. And directing Arnold and Red to contact Simmons was, in and of itself, an instance of wrongdoing because of the no contact order that was in effect.

[27] Although Smoots points out that the recorded jail conversations do not contain explicit statements of Smoots's intent that the others should threaten or otherwise dissuade Simmons from testifying, the circumstances strongly support the inference that Smoots acted with the intent to do so, as evidence of intent may be determined from a defendant's conduct and the natural consequences thereof. *Birari v. State,* 968 N.E.2d 827, 835 (Ind. Ct. App. 2012), *trans. denied.* In other words, the record supports the inference that Smoots engaged in conduct—directing Red and Arnold to threaten Simmons—that was designed to procure Simmons's absence from the trial and to prevent him from testifying against him.

[28] Thus, when considering this evidence, we conclude that the State proved by a preponderance of the evidence that Smoots's conduct was designed to prevent Simmons from testifying against him. Therefore, Smoots forfeited his right to confront Simmons at trial in light of that wrongdoing, and his Sixth

Amendment right to confrontation was not violated by the admission of Simmons's statements at trial.[2]

II. Sentencing

A. Abuse of Discretion

[29] Smoots claims that the trial court abused its discretion in sentencing him because it failed to identify several mitigating factors that were supported by the record. Smoots also contends that the trial court should not have considered the same aggravating evidence in imposing the sentence on the habitual offender count as it used to support the sentence on the underlying felony.

[30] In addressing Smoots's claims, we initially observe that sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007); *Hudson v. State,* 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). A trial court abuses its discretion when it fails to

[2] As an aside, we note that this court observed in *Scott* that "the forfeiture by wrongdoing doctrine" under the Confrontation Clause and the hearsay exception embodied in Indiana Evid. Rule 804(b)(5) "are very similar in theory." *Scott*, 139 N.E.3d at 1155. Evid. R. 804(b)(5) rule permits a "statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying." Smoots, however, did not challenge the admissibility of the evidence at trial on this basis. Nonetheless, it is apparent that Evid. R. 804(b)(5) would allow for the admission of Simmons's testimony.

enter a sentencing statement at all, its stated reasons for imposing the sentence are not supported by the record, its sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or its reasons for imposing the sentence are improper as a matter of law. *Anglemyer,* 868 N.E.2d at 490-91; *Hudson,* 135 N.E.3d at 979.

[31] When reviewing the aggravating and mitigating circumstances identified by the trial court in its sentencing statement, we will remand only if "the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record, and advanced for consideration, or the reasons given are improper as a matter of law." *Anglemyer,* 868 N.E.2d at 490.

[32] We further note that the relative weight assignable to reasons properly found by the trial court to enhance a defendant's sentence is not subject to review for abuse of discretion. *Gross v. State,* 22 N.E.3d 863, 869 (Ind. Ct. App. 2014), *trans. denied*. The determination of mitigating circumstances is within the trial court's discretion, and the trial court is under no obligation to explain why a proposed mitigator does not exist or why the court found it to be insignificant. *Sandleben v. State,* 22 N.E.3d 782, 796 (Ind. Ct. App. 2014), *trans. denied.* Additionally, a trial court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor, and the court is not required to give the same weight to proffered mitigating factors as does a defendant. *Rogers v. State,* 878 N.E.2d 269, 272 (Ind. Ct. App. 2007), *trans. denied*. So long as a sentence is within the statutory range, the trial court may impose it without regard to the existence of aggravating or mitigating factors. *Anglemyer,* 868 N.E.2d at 489. If

the trial court does find the existence of aggravating or mitigating factors, it must give a statement of its reasons for selecting a sentence it imposes. *Id.* at 490.

[33] Smoots claims that the trial court should have identified as mitigating circumstances the hardship that his child would face if incarcerated, and the fact that he had achieved certain educational requirements. Although Smoots earned his GED in 2010, he presented little evidence at the sentencing hearing that he was living a productive life, as he reported no substantial employment or stable housing when not incarcerated. Also, while Smoots argues that a lengthy incarceration would result in a hardship to his child, this court has observed that "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002). Smoots presented no evidence to demonstrate that the hardship to his family would be any worse than that normally suffered by a family whose relative is imprisoned. Thus, the trial court did not abuse its discretion in declining to identify this factor as a significant mitigating circumstance.

[34] We also reject Smoots's argument that the trial court abused its discretion in considering the same aggravating evidence in imposing the sentence on the habitual offender count as was identified to support the sentence in the underlying felony. Upon a determination that a person is a habitual offender, the length of the sentence enhancement imposed based upon such a finding is

left to the trial court's sound discretion. *Johnston v. State,* 578 N.E.2d 656, 659 (Ind. 1991); *Montgomery v. State*, 878 N.E.2d 262, 267 (Ind. Ct. App. 2007).

[35] Smoots points to no authority suggesting that the trial court may not consider the same circumstances when formulating the sentence for the various offenses. To the contrary, it is more logical that the trial court would consider many of the same circumstances because the habitual "enhancement is an integral part of the sentence imposed for the felony conviction" and part of the same determination of a punishment. *Williams v. State*, 494 N.E.2d 1001, 1003 (Ind. Ct. App. 1986), *trans. denied*; *see also Jackson v. State*, 105 N.E.3d 1081, 1085 (Ind. 2018) (explaining that a felony sentence and a habitual enhancement are part of the same "punishment"). For these reasons, we conclude that the trial court did not abuse its discretion in sentencing Smoots.

B. Inappropriate Sentence

[36] Smoots also argues that his sentence is inappropriate when considering the nature of the offenses and his character. More specifically, Smoots contends that his sentence should be revised because he did not "commit the type of crime that shocks the conscience or even makes a splash," and that he had only a "limited role" in the offenses. *Appellant's Brief* at 21.

[37] Indiana Appellate Rule 7(B) authorizes this court to independently review and revise the sentence imposed if, "after due consideration of the trial court's decision," it is determined that the sentence imposed is inappropriate when considering the nature of the offense and the character of the offender.

Whether a sentence is inappropriate ultimately depends upon "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference. *Id.* at 1222. That deference should prevail "unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Gerber v. State,* 167 N.E.3d 792, 797 (Ind. Ct. App. 2021) (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)).

[38] When reviewing a sentence, we seek to "attempt to leaven the outliers, not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225. On appeal, the defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). In determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Id.*

[39] In this case, Smoots was convicted of a Level 4 Felony, a Level 5 felony, two Level 6 felonies, and was found to be a habitual offender. The sentencing range for a Level 4 felony is two to twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5. The sentencing range for a Level 5 felony is one to six years, with an advisory sentence of three years. I.C. § 35-50-2-6. The

sentencing range for a Level 6 felony is six months to two-and-one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7 and the sentencing range for a habitual offender enhancement attached to a Level 4 felony is six to twenty years. I.C. § 35-50-2-8.

[40] At sentencing, the trial court found no mitigating circumstances and identified Smoots's juvenile and criminal history, the fact that the offenses were committed in the jail, and the fact that the harm Smoots inflicted on Simmons was greater than what was needed to prove the commission of the offenses, as aggravating factors. Accordingly, the trial court sentenced Smoots to one year above the advisory sentence on each of the Level 5 felonies, to three years greater than the advisory sentence on the Level 4 felony, to approximately one year more than the advisory sentence on each of the Level 6 felonies, and to an enhanced term of nine years—six years greater than the minimum sentence—on the habitual offender finding, for an aggregate sentence of twenty-four years.

[41] When examining the nature of the offenses that the defendant has committed, we consider the details and circumstances of the offenses, along with the defendant's participation therein. *Lindhorst v. State,* 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). Here, it is beyond dispute that the nature of Smoots's offenses was serious, as the evidence showed that Smoots confined and severely beat and choked Simmons inside a jail cell. Video surveillance from the jail showed Smoots in the cell above Simmons's pull his hair back and remove his shirt in preparation for the attack.

[42] The beating caused Simmons to sustain facial injuries, significant swelling, loss of consciousness and bowel control, and severe pain. Notwithstanding Smoots's contention that the trial court should have considered his alleged "limited role" in the attack, *appellant's brief* at 21, Simmons identified Smoots as the main perpetrator who choked him and rendered him unconscious. As a result of the violent episode, Simmons became incoherent and required immediate medical attention. Smoots also committed other related offenses, including enticing others to make direct threats against Simmons and his family members to prevent Simmons from testifying against him. In short, Smoots's argument that his sentence was inappropriate when considering the nature of the offenses avails him of nothing, as we are unpersuaded that the brutal and unprovoked offenses warrant revision of his sentence.

[43] In evaluating a defendant's character, we engage in a broad consideration of his or her qualities. *Moyer v. State,* 83 N.E.3d 136, 143 (Ind. Ct. App. 2017), *trans. denied.* A defendant's life and conduct are illustrative of character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied.* A defendant's criminal history is one relevant factor in analyzing character, the significance of which varies based on the "gravity, nature, and number of prior offenses in relation to the current offense." *Rutherford v. State,* 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Even a minor criminal history reflects poorly on a defendant's character for the purposes of sentencing. *Id.*

[44] Smoots's criminal history is substantial. He amassed juvenile adjudications that included five offenses that would be felonies and fourteen offenses that

would be misdemeanors, had he committed them as an adult. These included acts of burglary, theft, dangerous possession of a firearm, criminal conversion, receiving stolen property, criminal trespass, and fleeing law enforcement. Smoots also violated juvenile probation and had been placed in the Indiana Boys' School.

[45] As an adult, Smoots has accumulated felony convictions for theft, failure to return to lawful detention, and resisting law enforcement. Smoots also has prior misdemeanor convictions for false informing, possession of marijuana, and resisting law enforcement. He has violated probation and community corrections rules "several times." *Appendix Vol. III* at 287.

[46] In sum, based on the nature of the offense and Smoots's character, the twenty-four-year aggregate sentence that the trial court imposed is not inappropriate. Thus, we decline to revise Smoots's sentence.

[47] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.